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AMERICAN CIVIL LIBERTIES UNION

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944 9800

Norman Dorsen
[illegible]

Ira Glasser
[illegible]

June 15, 1984

MEMORANDUM

TO: Ira Glasser

FROM: Mort Halperin

Re: Southern California's Questions on H. R. 5614

Here is the analysis you requested of the questions raised in Ramona's letter of June 11th to ACLU affiliates:

1. Judicial Review

The bill in no way affects judicial scrutiny of CIA claims that material is exempt from disclosure. What it does do is to establish certain procedures with regard to judicial review of disputes over the application of the provisions of H.R. 5614, while making it clear that all such issues are to be determined de novo by the courts. This was not fully true in the Senate version, but it is in the House version, because we insisted on it.

These procedures simply codify practices that courts have invariably followed. With respect to allegations that documents have been improperly placed solely in designated files or that files have been improperly designated -- but not with respect to other issues such as whether files relate to the subject matter of an abuse investigation -- the bill does limit plaintiffs' right of discovery. However, we view this as a change in form rather than substance. Plaintiffs may still "suggest" to the court that certain information be made available or that certain specific questions be answered. In practice, that's what happens now. Courts now exercise very close supervision and normally severely restrict, plaintiffs' efforts to take discovery in FOIA cases against the CIA. Thus plaintiffs' "demands" for discovery are now treated by the courts as suggestions or requests, which are fully scrutinized and restricted before the CIA has to provide any specific information or answer specific questions. Thus, although this bill alters the normal procedure for discovery with respect to two issues, it will not alter the information we are able to get during litigation.

Finally, contrary to what Ramona's letter implies, the legislation in no way restricts the court's ability to conduct an in-camera inspection and the committee report emphasizes this and suggests [illegible] conduct in-camera reviews when necessary.

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. 2. Definition of Operational Files

Ramona asks whether files relating to "domestic counter-intelligence (illegal domestic spying)" would be exempt from "search and release". First of all, she must mean "search and review" since the bill in no way affects the criteria for "release" of information. Second, the answer is clearly "no". CIA domestic counter-intelligence activities are conducted by the Office of Security which does not have authority to designate those files as "operational" files. Moreover, and more important, the legislation is drafted so as to insure access to all files relating to domestic spying.

Unlike earlier versions, including the bill passed by the Senate, the latest House draft, which is the only version we support, provides clearly that all files relating to the specific subject matter of an investigation will be subject to search and review as if this legislation had not been enacted. This means that files relating to all of the subjects investigated by the Rockefeller, Church and Pike Committees as well as those investigated by the CIA and the Justice Department will be subject to search and review. In regard to any more recent or future abuses, including domestic spying, the procedure would work as follows. If we or anyone else suspects that the CIA has or is engaged in illegal or improper activity, we can make such an allegation to the CIA. The Agency is then obliged by its own rules to conduct some investigation. Regardless of how thorough that investigation or the conclusion reached is as to whether there was an impropriety, we can then make an FOIA request and get a search and review of all operational files relating to our allegation. Moreover, the scope of the search and review is determined by the scope of our allegation, not their investigation.

We have asked all users of the Act to let us see any documents related to domestic spying, or any other subject, which was received from the CIA under the FOIA and which would not be subject to search and review under the Act. No critic of the bill or anyone else has shown us such a document. The CIA has reviewed the complete list of CIA documents in our report "From Official Files" which contains all significant documents that we know of released from the CIA and has assured the Congress, in writing and on the record, that all the documents would continue to be available. (That list is attached to this memorandum).

We do not understand the question raising the spectre of more and more files being designated. The CIA does not now "designate" files. The bill permits it to designate only certain specifically defined files as operational. While the CIA says it will not designate all files eligible for designation, our analysis of the bill assumes that they would do so. Any allegation of improper designation would be subject to de novo judicial review.

3. CIA Backlog

Ramona asks whether there is not a "better solution" to the problem of long delays "other than creating additional exemptions." The bill does not create any new exemptions. It simply permits the Agency not to search through certain files which contain no information which is released under current exemptions or any conceivable set of exemptions. We do not believe that there was any other way to get the CIA to eliminate its backlog and to begin to respond to requests in weeks or months rather than years. When the 1974 amendments set 10-day deadlines for responses to FOIA requests, we and others went into court to seek to enforce the time limits. The courts uniformly delinced to do so on the grounds that the agencies were receiving far more requests than Congress anticipated and that it was up to Congress to remedy the situation. The CIA argued persuasively to the Congress that there was no way it could act faster as long as it had to review operational files, since those files could only be reviewed by senior officials familiar with the operation. We concluded that it was far better to have the CIA devote its time to reviewing files from which material is regularly released than to turning the pages of files from which nothing is ever released. There was and is no other way to eliminate the backlog and speed up the process. Our task was to accomplish this in a way that did not diminish public access to information now available or likely to be available under policies we would advocate. We think that we did that; your article in The Nation and my responses to Southern California's concerns in this memorandum should make that clear.

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